UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
****

CHARLES A. BRASINGTON, Din: # 16B0643

Petitioner,

-against-

U.S. DISTRICT COURT - N.D. OF N.Y.
FILED
MAR 08 2017
AT ____ O'CLOCK ______
Lawrence K. Baerman, Clerk - Syracuse

PETITION FOR WRIT OF HABEAS CORPUS

Docket Number

9: 17-CV-269

THOMAS J. STICHT, Superintendent
WYOMING CORRECTIONAL FACILITY,

Respondent.

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INTRODUCTION

The Petition of CHARLES BRASINGTON respectfully represents:

That I CHARLES BRASINGTON am the above-named Petitioner. I am a New York State prisoner. I am presently incarcerated at WYOMING CORRECTIONAL FACILITY (P.O. Box 501, Attica, New York 14011-0501).

Petitioner makes this instant Habeas Corpus pleading, acting pro se, under 28 U.S.C.A. 2254, claiming that defense counsel allowed his appeal rights to be lost, and as a result he been denied proper access to the appellate court.

FACTS

On January 4th, 2016 Petitioner plead guilty to the crimes of Grand Larceny in the Second Degree (N.Y. Penal Law § 155.40[1]), Grand Larceny in the Fourth Degree (N.Y. Penal Law § 155.30[5]) and Bail Jumping in the Second Degree (N.Y. Penal Law § 215.56) before the New York State, Chenango County Court under Indictment Numbers 2014-8 and 2015-44, respectively.

On February 19th, 2016 the State court sentenced the Petitioner to an aggregate indeterminate prison term of seven to fourteen years as a predicate felony offender plus restitution in the amount of Fifteen-Thousand Dollars.

Petitioner's attorney, SCOTT CLIPPINGER never satisfied his obligation to inform the Petitioner of his appeal rights in writing as required by New York Appellate Court Rules (See 22 NYCRR § 821.2[a]). Under New York law, this said obligation even applies in case were appeal rights have been waived (See People v. Kieffer, 191 A.D. 2d 1050 [N.Y.A.D. 4th Dept. 1993]), as in the case at bar.

Nevertheless, Petitioner timely notified his attorney of his desire to appeal by prison mail.

In October of 2016 Petitioner made a timely pro se motion for an extension of time to take an appeal as allowed by New York law (N.Y. CPL § 460.30[1]) thereto the New York State, Supreme Court, Appellate Division, Third Judicial Department under Docket Number 108806. The said intermediate appellate court denied the Petitioner's application to file a late Notice of Appeal on November 10th, 2016. The Petitioner sought timely reconsideration. The intermediate appellate court denied the Petitioner's application for reconsideration on January 12th, 2017.

TIMELINESS

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") the Petitioner's instant 28 U.S.C. § 2254 Petition seeking reinstatement of appeal rights is timely since it was brought within one-year of the judgment of conviction because the time that the Petitioner's New York CPL 460.30 Motion was pending for permission to file a late Notice of Appeal cannot be counted towards the tolling (See Perich v. Mazzuca, 2007 WL 2455136 [E.D.N.Y. 2007]).

EXHAUSTION

Petitioner's instant Federal claim is fully exhausted because under New York law, the Petitioner cannot raise a Syville claim (See People v. Syville, 15 N.Y. 3d 391 [N.Y. 2010]) by way of Writ of Error Coram Nobis insofar as the Petitioner sought relief within the statutory one-year period (See N.Y. CPL § 460.30) and having been denied he is not entitled to press the issue again (See People v. Andrews, 23 N.Y. 2d 605 [N.Y. 2014]).

MERITS

Petitioner's attorney provided him therewith constitutional ineffective assistance by failing to file the Notice of Appeal under New York law (See N.Y. CPL § 460.10[1]), despite the Petitioner's wishes.

Counsel's failure to file a Notice of Appeal deprived the Petitioner of the appellate process altogether (See Roe v. Flores-Ortega, 528 U.S. 470, at 483 [2000]). And because counsel's error has led to the forfeiture of the appellate process itself, prejudice is presumed and, therefore, Petitioner is entitled to his appeal rights (See McHale v. United States, 174 F. 3d 115, at 119-120 [2nd Cir. 1999]).

CONCLUSION

Due to the aforesaid reasons, Petitioner prays for

Habeas Corpus relief.

Dated: March 1st, 2017
Attica, New York.

Charles Brasington, Din: # 16B0643
Petitioner/Pro Se

Petitioner swears that the aforesaid is true and correct to the best of his own knowledge under the penalty of perjury.

Dated: March 1st, 2017
Attica, New York.

Charles Brasington, Din: # 16B0643
Petitioner/Pro Se

Sworn to before me this
3RD day of March, 2017.

NOTARY PUBLIC

JOHN A MALKOWSKI
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6315048
Qualified in Erie County
My Commission Expires November 27, 2018